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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1968
No. 328

LAWRENCE LAWSON WEBB,
Petitioner

vs.

CITY OF LYNCHBURG, VIRGINIA,
Respondent

Petition for Writ of Certiorari
To the Supreme Court of Appeals of Virginia

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July 22, 1968

PETITION AND APPENDICES FOR PETITIONER

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IN THE

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October Term, 1967

No. _____

LAWRENCE LAWSON WEBB,
Petitioner

vs.

CITY OF LYNCHBURG, VIRGINIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Lawrence Lawson Webb, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia entered in the above entitled case on April 24, 1968.

OPINIONS BELOW

The opinion and judgment of the Supreme Court of Appeals of Virginia is unreported and is printed in Appendix A hereto, infra page A2.

The opinion and judgment of the Corporation Court for the City of Lynchburg, Virginia, is printed in Appendix A hereto, infra, page A3.

JURISDICTION

The Judgment of the Supreme Court of Appeals of Virginia was entered on April 24, 1968, [infra, Appendix A, page A2]. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. DO THE "DUE PROCESS" AND THE "EQUAL PROTECTION OF THE LAW" CLAUSES OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES MAKE THE PROTECTIONS OF THE FIRST TEN AMENDMENTS TO THE UNITED STATES CONSTITUTION AVAILABLE TO A DEFENDANT CHARGED WITH OPERATING A MOTOR VEHICLE ON THE STREETS OF A CITY WHILE UNDER THE INFLUENCE OF ALCOHOL IN VIOLATION OF THE ORDINANCES OF SUCH CITY?

2. IS THERE A DIFFERENCE IN THE PROTECTION AFFORDED A DEFENDANT CHARGED WITH A FELONY AND THAT AFFORDED A DEFENDANT CHARGED WITH A MISDEMEANOR UNDER THE FOURTH, FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA?

3. WHEN NO EMERGENCY EXISTS, MAY A BLOOD SAMPLE BE WITHDRAWN BY COERCION FROM A DEFENDANT WITHOUT A SEARCH WARRANT AND THE RESULTS OF AN ALCOHOL CONTENT TEST MADE ON THE BLOOD ADMITTED IN EVIDENCE OVER HIS OBJECTION WITHOUT VIOLATING HIS CONSTITUTIONAL RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

4. SINCE SPEAKING BY A DEFENDANT IS GENERALLY LESS OBJECTIONABLE TO HIM THAN HAVING HIS BODY PUNCTURED FOR THE PURPOSE OF WITHDRAWING BLOOD, IS THE FIFTH AMENDMENT PROTECTION OF NOT BEING COMPELLED "TO BE A WITNESS AGAINST HIMSELF" AVAILABLE TO HIM WHEN HE IS COERCED INTO SUBMITTING TO HAVING A

BLOOD SAMPLE TAKEN AS WELL AS WHEN HE IS COERCED INTO SPEAKING AGAINST HIS INTEREST?

5. MAY A PERSON WHO IS CHARGED WITH A MISDEMEANOR AND WHO HAS NOT BEEN ADVISED OF HIS RIGHT TO COUNSEL, BY THE THREAT OF LOSING HIS RIGHT TO DRIVE A MOTOR VEHICLE ON THE HIGHWAYS OF A STATE, BE COERCED INTO SUBMITTING TO THE WITHDRAWAL OF HIS BLOOD WITHOUT VIOLATING HIS SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL?

6. ARE THE REQUIREMENTS OF EQUAL PROTECTION OF THE LAW MET WHEN THE BILL OF RIGHTS PROTECTION IS AFFORDED IN CRIMINAL CASES OF ONE CLASSIFICATION BUT NOT AFFORDED IN CRIMINAL CASES OF ANOTHER CLASSIFICATION IN THE SAME STATE OR LOCAL JURISDICTION?

7. SHOULD CITY ORDINANCES WHICH DO NOT PROVIDE FOR AFFORDING A DEFENDANT HIS RIGHTS UNDER THE BILL OF RIGHTS BE DECLARED UNCONSTITUTIONAL?

8. SHOULD A DEFENDANT WHO HAS BEEN CONVICTED UNDER SUCH ORDINANCES HAVE HIS CONVICTION SET ASIDE?

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

1. The constitutional provisions involved are as stated below:

The Fourth Amendment to the United States Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreason-

able searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The Fifth Amendment to the United States Constitution provides as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for pubic use, without just compensation."

The Sixth Amendment to the United States Constitution provides as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Section 1. of the Fourteenth Amendment to the United States Constitution provides as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where-

> in they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The ordinances involved are as stated below and are printed in Appendix B hereto, infra, as indicated:

Section 20-84 of the Code of the City of Lynchburg, Virginia, as adopted on July 24, 1958, is found on page 410 of said Code, page 7 of the record and is printed in Appendix B hereto, infra, page B1.

Section 20-85 of the Code of the City of Lynchburg, Virginia, as adopted on July 24, 1958, and amended on February 28, 1967, is found on page 410 of said Code, page 7 of the record and is printed in Appendix B hereto, infra, page B1.

Section 20-85.1 of the Code of the City of Lynchburg, Virginia, as adopted on February 28, 1967, is found on page 414.2 of said Code, page 13 of the record and is printed in Appendix B hereto, infra, page B8.

Section 20-87 of the Code of the City of Lynchburg, Virginia, as adopted on July 24, 1958, and amended on February 28, 1967, is found on page 414.3 of said Code, page 14 of the record and is printed in Appendix hereto, infra, page B9.

Section 20-88 of the Code of the City of Lynchburg, Virginia, as adopted on July 24, 1958, and amended on September 27, 1960, and on June 26, 1962, is found on page 414.4 of said Code, page 15 of the record and is printed in Appendix B hereto, infra, page B10.

Section 20-89 of the Code of the City of Lynchburg, Virginia, as adopted on July 24, 1958, is found on page 414.5 of said Code, page 16 of the record and is printed in Appendix B hereto, infra, page B11.

STATEMENT

References to the Record in this matter will be (R. pg. —) and to the Transcript of the oral testimony (Tr. pg.—).

On August 25, 1967, at shortly before 1:30 A. M., the defendant, Lawrence Lawson Webb, was placed under arrest by Police Officer D. T. Robertson, of the Lynchburg City Police Force, and charged with driving his automobile on the streets of the City of Lynchburg, Virginia while under the influence of intoxicants. Officer Robertson stated that he had observed the defendant in his automobile and his manner of operating it at or near the intersection of Murrell Road and Lakeside Drive in the City of Lynchburg, Virginia, and had proceeded to follow him on and along Lakeside Drive until he reached the intersection of Lakeside Drive and Oakley Avenue in the City of Lynchburg, Virginia, where he pulled up alongside the defendant. He asked Webb for his driver's permit and registration card, and while the defendant was getting these, the officer noticed a can of beer resting beside the defendant's leg. When Webb got out of the car he was unsteady on his feet and he had a strong odor of alcohol on his breath and his eyes were bloodshot. Officer Robertson placed him under arrest and advised him of his implied consent law and then called the patrol wagon. (Tr. pg. 12).

Officer C. A. Sowers of the Lynchburg City Police Force came with the patrol wagon, arriving there at approximately 1:27 A. M., and he also advised Mr. Webb of his implied consent law. (Tr. pg. 17). Mr. Webb stated to Officer Sowers that he wanted to take the blood test and they proceeded to the Lynchburg General Hospital Emergency Room where a blood test was taken by a registered nurse at about 1:49 A. M. and he was then taken to the Lynchburg Police Station.

The defendant is a route salesman for the Dr. Pepper Company and leaves the plant around 7 o'clock, driving to Buena Vista, Lexington and Fairfield, and usually gets back around 8 o'clock. (Tr. pg. 27).

On September 27, 1967, trial was held in the Municipal Court of the City of Lynchburg, Virginia, and the defendant was convicted, which conviction was appealed, thus under the laws of Virginia entitling the defendant to a trial *de novo* in a court of record. The case was set for trial on November 14, 1967, in the Corporation Court for the City of Lynchburg, Virginia, to be tried under the city ordinances for the said city, which are identical to the statutes of the State of Virginia.

On November 14, 1967, before the jury trial began the defendant by counsel moved to suppress the evidence of the alcoholic content of the defendant's blood by not admitting the City's Exhibit 3, (R. pg. 17) which shows a blood alcohol content of 0.20,% into the evidence before the jury. The following discussion took place:

> "MR. WHITEHEAD: We will stipulate but what I want to do now is to pick it up from there, if your Honor please, and proceed with the fact that we at this time know that a blood test has been taken and know it has been returned and the certificate has been made here but we at this time have to, so there will be no prejudice against the defendant during the trial, we want to at this time move your Honor to suppress and not permit the blood test to be admitted in evidence on the ground that the taking of the blood as provided for under the statute is unconstitutional and illegal and therefore the defendant having been required by this to give evidence against himself, although with his written consent, because under the law, faced with this situation whereby the penalties is punishment if he does not take the blood test, then he stands to have his permit revoked for at least ninety days and therefore we feel, if your Honor please, that this statute in admitting this blood test and requiring under the circumstances, as provided by the statute, is unconstitutional and we ask that this blood test

be not admitted in evidence in this case for those reasons.

THE COURT: On the ground that it is unconstitutional but not on the ground that the statute was not complied with. I understand it is stipulated that the statute was complied with but that the statute is unconstitutional.

MR. WHITEHEAD: That is our position.

THE COURT: I will overrule that. Several of the Supreme Courts of different states have passed on the constitutionality of the statute. Maybe one said it was unconstitutional but I think the majority view is that it is constitutional so I will overrule your motion and let it be admitted.

MR. JESTER: Just for the record I will point out that the statute provides expressly if any person with a license by Virginia or not who operates a motor vehicle upon a public highway in this state on or after July 1, 1964, shall be deemed thereby as a condition of such operation to have consented to have a sample of his blood taken for chemical tests to determine the alcoholic content thereof. It will be the view of the Commonwealth as a condition precedent to operating a motor vehicle, which is not a legal right per se, but a franchise privilege granted to the individual by the State, the individual has agreed to have the blood specimen taken by virtue of his operation of a motor vehicle upon the highway.

MR. WHITEHEAD: Now, if your Honor please, our answer to that briefly is that the statute might provide that but this is a criminal act whereby this man is being tried on a criminal charge and therefore he is being put in a position whereby he is being compelled to give evidence against himself

as provided for under the statute, because if he doesn't he will lose his permit for at least ninety days and his right to drive; and we may further stipulate, so there will be no misunderstanding, that when the Commonwealth does offer the certificate that at that time may these objections I have made now stand in taking place of that so we do not have to raise these questions before the jury?

THE COURT: Yes, Sir. You have made your motion to supress and I am ruling at this time it is admissible so it will not be necessary to object at the time it is offered but I will let the record show that you made your objection and the point is saved as far as you are concerned." (Tr. pgs. 3-6)

On the trial proceeding the jury found the defendant guilty of the offense charged and fixed his punishment at a fine of $200.00. (Tr. pg. 37). The defendant, by counsel, moved the Court to dismiss the charges against him on the grounds previously stated, which motion was overruled (Tr. pgs. 37-38), and final judgment was entered and the execution of the judgment suspended until February 5, 1968, on November 14, 1967. (R. pg. 19-20, App. A 3-A4).

On January 12, 1968, the defendant, by counsel, filed his notice of appeal to the Supreme Court of Appeals of Virginia and his assignments of error. (R. pg. 21). Numbered paragraphs (1) and (4) raise the federal questions to be resolved and read as follows:

***

"(1). In refusing to suppress and admitting certain evidence, objections and exceptions heretofore taken, especially as to certificate of blood alcohol analysis of 0.20%;

***

(4).. In refusing to set the verdict aside as the statute and ordinances under which the defendant was arrested, tried and convicted, are unconstitutional and violate the defendant's

rights and privileges granted to him by the United States Constitution."

On February 5, 1968, the Corporation Court for the City of Lynchburg entered an order further suspending the execution of the judgment herein until the first day of the March, 1968, term of the Court. (R. 25, App. A2).

A timely petition was filed in the Supreme Court of Appeals of Virginia raising among others the questions set forth in the assignment of errors referred to above and asking for a Writ of Error and Supersedeas.

On April 24, 1968, the Supreme Court of Appeals of Virginia entered an order rejecting the petition and refusing said Writ of Error and Supersedeas, the effect of which was to affirm the judgment of the Corporation Court of the City of Lynchburg, Virginia. (App. A2).

On June 12, 1968, the Supreme Court of Appeals of Virginia entered an order staying the execution of judgment herein until July 23, 1968. (App. A1).

REASONS FOR GRANTING THIS WRIT

1. The rationale of *Schmerber* v. *California,* (1966) 384 U.S. 757, 16 L ed 2d 908, 82 S Ct 1826 requires an emergency before a blood sample may be withdrawn from a defendant by coercion without violating the defendant's rights against unreasonable searches and seizures under the Fourth Amendment as made applicable to state Court prosecutions by the Fourteenth Amendment. There is no hint of an emergency in the evidence presented in the case at hand. An emergency is specifically negated by the testimony of both officer's that they advised the petitioner of his rights under the "implied consent law" which included being taken before a magistrate as set forth in paragraph (c) of Section 20-85 of the City of Lynchburg Code. (App. B. pg. B2). Also under the same paragraph he was advised that if he didn't

permit the blood sample to be taken he could be prosecuted for refusing and his privilege to drive on the highways of Virginia suspended on conviction. This was subtle but very effective coercion. The petitioner was put in the position of having to waive a constitutionally protected right in order to enjoy the privilege of driving on the highway. In *Garrity* v. *New Jersey,* (1967), 385 U.S. 493, L ed 2d 562, 87 Ct 616 this Court held that such coercion is unconstitutional under the Fourteenth Amendment with respect to self-incrimination, the same rationale should apply to coercion in respect to searches and seizures. The ordinances involved here make no provision for the issuance of a search warrant and as applied to the petitioner violated his constitutional rights under the Fourth Amendment and should be declared unconstitutional by this Court.

2. The petitioner also contends that the provisions of the ordinances in question here as applied to him also violated his Fifth Amendment rights against self-incrimination; that the rationale of Chief Justice Warren's dissenting opinion in *Breithaupt* v. *Abram,* (1957), 352 U.S. 432, 440, 1 L ed 448, 453, 77 S Ct 408 and the majority opinion in *Garrity* v. *New Jersey,* ibid, should be applied in this case.

3. Although not specifically raised herein previously, by granting certiorari in this case the Court will be in a position to consider the question of applying the rationale of *Miranda* v. *Arizona,* (1966), 384 U.S. 436, 16 L ed 2d 694, 86 S Ct 1602 to misdemeanors with respect to warnings about self-incrimination and the right to counsel under the sixth Amendment. It is particularly significant in this case where petitioner was neither advised of his right to remain silent nor advised of his right to counsel before he was thrust between the "rock and the whirlpool." The constitutional rights of those charged with felonies and the economic and social loss in many instances of conviction for misdemeanors are far greater than those incurred by a convicted felon. The Court is urged to consider this matter.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 22, 1968

Appendices

APPENDIX A

ORDER OF THE SUPREME COURT OF APPEALS OF VIRGINIA STAYING EXECUTION OF JUDGMENT

VIRGINIA: *In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 12th day of June,* 1968.

Lawrence Lawson Webb, Plaintiff in error,

against Record No. R-8729

City of Lynchburg, Defendant in error.

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the plaintiff in error, by counsel, praying for a stay of execution of the judgment entered herein on April 24, 1968, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-styled case entered on April 24, 1968, be, and the same is hereby, stayed, until the 23rd day of July, 1968, on the expiration of which time the same may be enforced unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

ORDER OF THE SUPREME COURT OF APPEALS OF VIRGINIA

REFUSING A WRIT OF ERROR AND SUPERSEDEAS

VIRGINIA: *In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 24th day of April,* 1968.

The petition of Lawrence Lawson Webb for a writ of error and supersedeas to a judgement rendered by the Corporation Court of the City of Lynchburg on the 14th day of November, 1967, in a prosecution by the City of Lynchburg against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said corporation court.

ORDER OF THE CORPORATION COURT FOR THE CITY OF LYNCHBURG, VIRGINIA EXTENDING SUSPENSION OF THE EXECUTION OF JUDGMENT

VIRGINIA: *At Lynchburg Corporation Court, February 5th,* 1968.

City of Lynchburg

vs. Misdemeanor. Drive under influence of intoxicants.

Lawrence Lawson Webb, (white), Accused.

On motion of the accused, by his attorney, it is ordered that execution of the judgment in this case be further suspended until the first day of the March, 1968, term of this court.

OPINION AND JUDGMENT OF THE CORPORATION COURT FOR THE CITY OF LYNCHBURG, VIRGINIA

VIRGINIA: *At Lynchburg Corporation Court, November 14th, 1967.*

City of Lynchburg

vs. Misdemeanor. Driving under influence of intoxicants.

Lawrence Lawson Webb, (white), Accused.

This day came the City of Lynchburg, by the Commonwealth's attorney, and the said Lawrence Lawson Webb appeared in his own proper person according to the condition of his recognizance, and said accused also appeared by his attorney; and said accused in his own proper person pleaded not guilty to the charge of unlawfully operating a motor vehicle while under the influence of intoxicants, in violation of the Ordinances of the City of Lynchburg, and thereupon came a jury, to-wit, Bobby L. Angel, Mrs. Letty R. Frazier, Mrs. Vivian Green, Mrs. Annie Jennings and James D. Turner, who having been duly summoned, selected, tried and sworn according to law, and having heard the evidence and argument of counsel, and having received the instructions of the court, were sent to their room to consult and consider of their verdict, and after some time returned into court and presented their verdict, written on a blank sheet of paper in the words and figures following, to-wit: "Upon a charge of unlawfully operating a motor vehicle while under the influence of intoxicants, in violation of the Ordinances of the City of Lynchburg, We the Jury, find the accused Guilty and fix his punishment at $200.00 Fine. Vivian J. Greene, Foreman." Thereupon the accused by his attorney moved the court to set aside said verdict, on the ground that said verdict is contrary to the law

and the evidence, and that the evidence is insufficient to support a conviction of said accused, and on the further ground of the error of the court in admitting certificate as to blood test, which motion the court doth overrule, and said accused by his attorney excepted.

It is therefore considered by the court that the said Lawrence Lawson Webb, who has been present in his own proper person at all time throughout the trial of this case, forfeit and pay to the City of Lynchburg $200.00, the amount of the fine aforesaid, according to the verdict of the jury, and that he pay the costs of this prosecution. And said accused shall be held in jail until the payment of said fine and costs, provided said term in jail shall not exceed sixty days.

At the instance of the accused, who by his attorney intimated his intention to apply for a writ of error and supersedeas to the foregoing judgment, the court doth order that execution of said judgment be suspended until the first day of the February, 1968, term of this court.

On motion of the accused he is allowed bail. Thereupon the said Lawrence Lawson Webb, together with A. H. Moore, his surety, who justified as to his sufficiency, was duly recognized in the sum of $500.00, upon condition that if the said Lawrence Lawson Webb shall make his personal appearance before the Corporation Court for the City of Lynchburg, at the courthouse thereof, on the 1st day of the February, 1968, term thereof, at 9:30 o'clock A.M., to answer the foregoing judgment, and shall make his personal appearance at any time or times to which this case may be continued or further heard, before any court, judge or justice having or holding any proceeding in connection therewith, to answer the judgment, and shall not depart thence without leave of court, judge or justice, then said recognizance shall be void, otherwise to remain in full force and effect.

APPENDIX B

Ordinances Involved:

Section 20-84 of the City Code for the City of Lynchburg, Virginia, provides:

Sec. 20-84. Driving automobile, engines, etc., while under the influence of whiskey, drugs, etc.—Prohibited.

No person shall drive or operate any automobile or other motor vehicle, car, truck, engine or train while under the influence of alcohol, brandy, rum, whiskey, gin, wine, beer, lager beer, ale, porter, stout or any other liquid, beverage or article containing alcohol or while under the influence of any narcotic drug or any other self-administered intoxicant or drug or whatsoever nature. (7-24-58).

Section 20-85 of the City Code for the City of Lynchburg, Virginia, provides:

Sec. 20-85. Same—Use of Chemical test to determine alcohol in blood; procedure, qualifications and liability of persons withdrawing blood; costs; evidence; suspension of license for refusal to submit to test.

(a) As used in this section "license" means any operator's, chauffeur's or learner's permits or license authorizing the operation of a motor vehicle upon the highways.

(b) Any person whether licensed by Virginia or not, who operates a motor vehicle on and after July one, nineteen hundred sixty-four, shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood taken for a chemical test to determine the alcoholic content thereof, if such person is arrested for a violation of Section 20-84 within two hours of the alleged offense.

(c) If a person after being arrested for a violation of Section 20-84 and after having been advised by the arresting officer that a person who operates a motor vehicle upon a public highway in this City shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood taken for a chemical test to determine the alcoholic content thereof, and that the unreasonable refusal to do so constitutes grounds for the revocation of the privilege of operating a motor vehicle upon the highways of this State, then refuses to permit the taking of a sample of his blood for such tests, the arresting officer shall take the person arrested before a committing magistrate and if he does again so refuse after having been further advised by such magistrate of the law requiring a blood test to be taken and the penalty for refusal, and so declares again his refusal in writing upon a form provided by the Chief Medical Examiner of Virginia (hereinafter referred to as Chief Medical Examiner), or refuses or fails to so declare in writing and such fact is certified as prescribed in paragraph (j), then no blood sample shall be taken even though he may thereafter request same.

(d) Only a physician, registered professional nurse, graduate laboratory technician or a technician or nurse designated by order of a court of record acting upon the recommendation of a licensed physician, using soap and water to cleanse the part of the body from which the blood is taken and using instruments sterilized by the accepted steam sterilizer or some other sterilizer which will not affect the accuracy of the test, or using chemically clean sterile disposable syringes, shall withdraw blood for the purpose of determining the alcoholic content thereof. No civil liability shall attach to any person authorized to withdraw blood as provided herein as a result of the act of withdrawing blood from any person submitting thereto, provided the blood was withdrawn according to recognized medical procedures; and provided further that the foregoing shall not relieve any such person

from liability for negligence in the withdrawing of any blood sample.

(d1) Portions of the blood sample so withdrawn shall be placed in each of two vials provided by the Chief Medical Examiner, which vials shall be sealed and labeled by the person taking the sample or at his direction, showing on each the name of the accused, the name of the person taking the blood sample, and the date and time the blood sample was taken. The vials shall be placed in two containers provided by the Chief Medical Examiner, which containers shall be sealed so as not to allow tampering with the contents. The arresting or accompanying officer shall take possession of the two containers holding the vials as soon as the vials are placed in such containers and sealed, and shall transport or mail one of the vials forthwith to the Chief Medical Examiner. The officer taking possession of the other container (hereinafter referred to as second container) shall, immediately after taking possession of said second container give to the accused a form provided by the Chief Medical Examiner which shall set forth the procedure to obtain an independent analysis of the blood in the second container, and a list of those laboratories and their addresses, approved by the State Health Commissioner; such form shall contain a space for the accused or his counsel to direct the officer possessing such second container to forward that container to such approved laboratory for analysis, if desired. The officer having the second container, after delivery of the form referred to in the preceding sentence (unless at that time directed by the accused in writing on such form to forward the second container to an approved laboratory of the accused's choice, in which event the officer shall do so) shall deliver said second container to the chief of police who shall keep it in his possession for a period of seventy-two (72) hours, during which time the accused of his counsel may, in writing, on the form provided hereinabove, direct the chief of police to mail it to the laboratory of the accused's choice chosen from the approved list.

(d2) The testing of the contents of the second container shall be made in the same manner as hereafter set forth concerning the procedure to be followed by the Chief Medical Examiner, and all procedures established herein for transmittal, testing and admission of the result in the trial of the case shall be the same as for the sample sent to the Chief Medical Examiner.

(d3) A fee not to exceed $15.00 shall be allowed the approved laboratory for making the analysis of the second blood sample which fee shall be paid out of the appropriation for criminal charges. If the persons whose blood sample was withdrawn is subsequently convicted for violation of Section 20-84, the fee charged by the laboratory for testing the blood sample shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the City treasury.

(d4) If the chief of police having possession of the second container is not directed as herein provided to mail it within seventy-two (72) hours after receiving said container then said officer shall destroy same.

(e) Upon receipt of the blood sample forwarded to his office for analysis, the Chief Medical Examiner shall cause it to be examined for alcoholic content and he or an Assistant Chief Medical Examiner shall execute a certificate which shall indicate the name of the accused, the date, time and by whom the blood sample was received and examined, a statement that the container seal had not been broken or otherwise tampered with, a statement that the container was one provided by the Chief Medical Examiner and a statement of the alcoholic content of the sample. The certificate attached to the vial from which the blood sample examined was taken shall be returned to the clerk of the court in which the charge will be heard. The certificate attached to the container forwarded on behalf of the accused shall also be returned to the clerk of the court in which the charge will be heard, and such certificate shall be admissible in evidence when attested by

the pathologist or by the supervisor of the laboratory approved by the State Health Commissioner.

(f) When any blood sample taken in accordance with the provisions of this section is forwarded for analysis to the office of the Chief Medical Examiner, a report of the results of such analysis shall be made and filled in that office. Upon proper identification of the vial into which the blood sample was placed, the certificate as provided for in this section shall, when duly attested by the Chief Medical Examiner, or any Assistant Chief Medical Examiner, be admissible in any court, in any criminal proceeding, as evidence of the facts therein stated and of the results of such anaylsis.

(g) Upon the request of the person whose blood sample was taken for a chemical test to determine the alcoholic content thereof, the results of such test or tests shall be made available to him.

(h) A fee not exceeding five dollars shall be allowed the person withdrawing a blood sample in accordance with this section, which fee shall be paid out of the appropriation for criminal charges. If the person whose blood sample was withdrawn is subsequently convicted for violation of Section 20-84, the amount charged by the person withdrawing the sample shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the City treasury.

(i) In any trial for a violation of Section 20-84, this section shall not otherwise limit the introduction of any relevant evidence bearing upon any question at issues before the court, and the court shall, regardless of the result of the blood test or tests, if any, consider such other relevant evidence of the condition of the accused as shall be admissible in evidence. The failure of an accused to permit a sample of his blood to be withdrawn for a chemical test to determine the alcoholic content thereof is not evidence and shall not be subject to comment at the trial of the case; nor shall the fact that a

blood test had been offered the accused be evidence or the subject of comment.

(j) The form referred to in paragraph (c) shall contain a brief statement of the law requiring the taking of a blood sample and the penalty for refusal, a declaration of refusal and lines for the signature of the person from whom the blood sample is sought, the date and the signature of a witness to the signing. If such person refuses or fails to execute such declaration, the committing justice shall certify such fact, and that the committing justice advised the person arrested that such refusal or failure, if found to be unreasonable, constitutes grounds for the revocation of such person's license to drive. The committing or issuing justice shall forthwith issue a warrant charging the person refusing to take the test to determine the alcoholic content of his blood, with violation of this section. The warrant shall be executed in the same manner as criminal warrants.

(k) The executed declaration of refusal or the certificate of the committing justice, as the case may be, shall be attached to the warrant and shall be forwarded by the committing justice to the court in which the offense of driving under the influence of intoxicants shall be tried.

(l) When the court receives the declaration of refusal or certificate referred to in paragraph (k) together with the warrant charging the defendant with refusing to submit to having a sample of his blood taken for the determination of the alcoholic content thereof, the court shall fix a date for the trial of said warrant, at such time as the court shall designate, but subsequent to the defendant's criminal trial for driving under the influence of intoxicants.

(m) The declaration of refusal or certificate under paragraph (k), as the case may be, shall be prima facie evidence that the defendant refused to submit to the taking of a sample of his blood to determine the alcoholic content thereof as

provided hereinabove. However, this shall not be deemed to prohibit the defendant from introducing on his behalf evidence of the basis for his refusal to submit to the taking of a sample of his blood to determine the alcoholic content thereof. The court shall determine the reasonableness of such refusal.

(n) If the court shall find the defendant guilty as charged in the warrant, the court shall suspend the defendant's license for a period of 90 days for a first offense and for six months for a second or subsequent offense or refusal within one year of the first or other such refusals; the time shall be computed as follows: The date of the first offense and the date of the second or subsequent offense.

(o) The court shall forward the defendant's license to the Commissioner of the Division of Motor Vehicles of Virginia as in other cases of similar nature for suspension of license unless, however, the defendant shall appeal his conviction in which case the court shall return the license to the defendant upon his appeal being perfected.

(p) The procedure for appeal and trial shall be the same as provided by law for misdemeanors.

(q) No person arrested for a violation of Section 20-84 shall be required to execute in favor of any person or corporation a waiver or release of liability in connection with the withdrawal of blood and as a condition precedent to the withdrawal of blood as provided for herein.

(r) The court or the jury trying the case shall determine the innocence or the guilt of the defendant from all the evidence concerning his condition at the time of the alleged offense.

(s) The steps herein set forth relating to the taking, handling, identification, and disposition of blood samples are procedural in nature and not substantive. Substantial com-

pliance therewith shall be deemed to be sufficient. Failure to comply with any one or more of such steps or portions thereof, or a variance in the results of the two blood tests shall not of itself be grounds for finding the defendant not guilty, but shall go to the weight of the evidence and shall be considered as set forth above with all the evidence in the case, provided that the defendant shall have the right to introduce evidence on his own behalf to show noncompliance with the aforesaid procedure or any part thereof, and that as a result his rights were prejudiced. (7-24-58; 2-28-67).

Section 20-85.1 of the City Code for the City of Lynchburg, Virginia, provides:

Sec. 20-85.1. Same—Driving Automobile, Engine, Etc., while ability to drive is impaired by alcohol.

It shall be unlawful for any person to drive or operate any automobile or other motor vehicle, car, truck, engine or train while such person's ability to drive or operate such vehicle is impaired by the presence of alcohol in his blood. A person's ability to drive or operate such a vehicle shall be deemed to be impaired by the presence of alcohol in his blood within the meaning of this section when such person has so indulged in alcoholic intoxicants as to lack the clearness of intellect and control of himself which he would otherwise possess.

In every prosecution under Section 20-84 of this Code the offense with which the accused is charged shall be deemed to include the offense punishable under this section; and whenever in any such prosecution it appears that the amount of alcohol in the blood of the accused at the time of the alleged offense as indicated by a chemical analysis of the accused's blood in accordance with the provisions of Section 20-85 is as much as 0.10 but less than 0.15 percent by weight it shall be presumed that the ability of the accused was impaired within the meaning of this section. No person shall be arrested, prosecuted or convicted for violation of this section

except as a lesser included offense of a prosecution for violation of Section 20-84 of this Code.

Every person violating the provisions of this section shall be guilty of a misdemeanor and punished as provided in Section 1-6 of this Code; provided, that in addition to such punishment, upon every such first conviction the judge shall suspend the right of the accused to operate any motor vehicle upon the highways of this State for a period of six months, and upon any second or subsequent such conviction, within a period of five years such suspension shall be for a period of twelve months. (2-28-67)

Section 20-87 of the City Code for the City of Lynchburg, Virginia, provides:

Sec. 20-87. Same—Presumptions from alcoholic content of blood.

In any prosecution for a violation of Section 20-84 of this Code, the amount of alcohol in the blood of the accused at the time of the alleged offense as indicated by a chemical analysis of the accused's blood in accordance with the provisions of Section 20-85 of this Code shall give rise to the following presumptions:

(1) If there was at that time 0.05 per cent or less by weight of alcohol in the accused's blood, it shall be presumed that the accused was not under the influence of alcoholic intoxicants;

(2) If there was at that time in excess of 0.05 per cent but less than 0.15 per cent by weight of alcohol in the accused's blood, such facts shall not give rise to any presumption that the accused was or was not under the influence of alcoholic intoxicants, but such facts may be considered with other competent evidence in determining the guilt or innocence of the accused; provided, however, such facts shall not preclude prosecution and conviction under Section 20-85.1 of this Code.

(3) If there was at that time 0.15 per cent or more by weight of alcohol in the accused's blood, it shall be presumed that the accused was under the influence of alcohol intoxicants. (7-24-58; 2-28-67.)

Section 20-88 of the City Code for the City of Lynchburg, Virginia, provides:

Sec. 20-88. Same—Penalty—Subsequent offense; prior conviction.

Any person violating any provision of Section 20-84 shall be guilty of a misdemeanor and shall be punished, for a first offense by a fine of not less than two hundred dollars nor more than one thousand dollars or by confinement in jail for not less than one month nor more than six months, either or both in the discretion of the jury or the Court trying the case without a jury. Any person convicted within any period of ten years of a second or other subsequent offense under Section 20-84, or convicted of a first offense under Section 20-84 after having been convicted within a period of ten years prior thereto of an offense under former Section 84 or former Section 3315, shall be punishable by a fine of not less than two hundred dollars nor more than one thousand dollars and by confinement in jail for not less than one month nor more than one year. For the purposes of this section a conviction or finding of not innocent in the case of a juvenile under the provisions of Section 20-84, former Section 84 or former Section 3315, the ordinance of any county, city or town in this state or any other state, or the laws of this state or any other state substantially similar to the provisions of Sections 20-84 through 20-87 shall be considered a prior conviction. (7-24-58; 9-27-60; 6-26-62.)

Section 20-89 of the City Code for the City of Lynchburg, Virginia, provides:

Sec. 20-89.—Same—Same—Forfeiture of driver's license; suspension of sentence.

The judgment of conviction or finding of not innocent in the case of a juvenile if for a first offense under section 20-84, shall of itself operate to deprive the person so convicted or found of the right to drive or operate any such vehicle, conveyance, engine or train in this state for a period of one year from the date of such judgment, and if for a second or other subsequent offense within ten years thereof for a period of three years from the date of the judgment of conviction or finding of not innocent thereof. If any person has heretofore been convicted or found not innocent of violating any similar act of this state or political subdivision thereof and thereafter is convicted or found not innocent of violating the provisions of section 20-84, such conviction or finding shall, for the purpose of this section and section 20-84, be a subsequent offense and shall be punished accordingly; and the court may, in its discretion, suspend the sentence during the good behavior of the person convicted or found not innocent. (7-24-58.)